United States Court of Appeals

for the Second Circuit

REPLY BRIEF

76-1155

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FOR THE SECOND CIRCUIT

IN RE APPLICATION OF THE UNITED STATES OF AMERICA IN THE MATTER OF AN ORDER AUTHORIZING THE USE OF A PEN REGISTER OR SIMILAR MECHANICAL DEVICE.	APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF

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Authorities Cited

Cases

Statutes

New York Telephone Company (Appellant) submits this brief in reply to the arguments advanced by the United States (Government) in its brief submitted on April 16, 1976.

The brief of the Government herein fails to grapple in any meaningful way with the essential question of where does the Court below get the power to issue the Order it did. It does not purport to justify the Order under Title III of the Omnibus Crime Act, and it has failed to respond to our arguments as to why other possible bases are not applicable. We submit that the Order as issued cannot be justified, and that the Government should proceed, if at all, under Title III with the very carefully designed safeguards that legislation incorporates.

Appellant, as a telephone company, has a special responsibility to foster and safeguard the privacy of communications. Persons have an inherent right to feel that they can use the telephone with the same degree of privacy they have when talking face to face. Any undermining of this confidence would seriously impair the usefulness and value of telephone communications. Given the extent to which social and business intercourse is today conducted by telephone, any undue disclosure of the use of the telephone is inconsistent with the rights of a free society. While disclosure of to whom calls are made is a lesser invasion of privacy than actually listening to and disclosing the content of communications, even the fact of the existence

of a communication has been considered entitled to protection as evidenced by the provisions of Section 605 of the Communications Act originally enacted in 1934. (47 U.S.C. § 605)

There has, of course, always been a need to balance the protection of the privacy of communications with the legitimate needs of law enforcement. Congress and the courts have wrestled with that problem for many decades and in 1968 Congress passed a comprehensive act known as the Omnibus Crime Control and Safe Streets Act (18 U.S.C. § 2510 et seq.) in an attempt to strike a satisfactory balance. In 1971 that act was amended to authorize courts, under strict limitations, to direct telephone companies to provide assistance in the form of the "information, facilities and technical assistance" necessary for the law enforcement or investigative agency to implement the Order it has secured. That is the only statutory provision for the kind of Order issued by the Court below.

It is clear from the Government's brief that the Government, if it had chosen to do so, could have obtained authorization for the facilities to make possible the installation of pen registers pursuant to the provisions of Title III. Indeed, as the Government admits, it has obtained a prior order in this investigation pursuant to Title III which also authorized the use of a pen register (Gov. brief, p. 2). Numerous cases cited in the briefs show the inclusion

of pen register authority in the Title III orders involved. See, e.g., United States v. Finn, 502 F.2d 939 (7th Cir. 1974), United States v. Brick, 502 F.2d 219 (8th Cir. 1974), United States v. Falcone, 505 F.2d 478 (3rd Cir. 1974), cert. denied 420 U.S. 955 (1975). Had the Government chosen to proceed under Title III for the order at issue here, there would be no dispute. Appellant could cooperate under the statutory mandate of 18 U.S.C. § 2511 and, indeed, has done so on numerous occasions.

Instead, the Government, either because for some reason it does not want to obtain the required authorization of the Attorney General or his designate, or because of mere administrative convenience, has chosen to seek authorization for its use of pen registers, and the desired assistance of the telephone company, outside of the provisions of Title III, based upon some claimed inherent authority of the District Court.

The Government does not set forth any statutory basis upon which such an order may be issued except to state that it would be: ". . .a proper exercise of the jurisdiction of the District Court, resting as it does on the common law and the fair implications of Rule 41, Fed. R. Cr. P." (Gov. brief, p. 10). As Mr. Justice Brandeis aptly held, "There is no federal general common law." Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938). Further, as Appellant

points out in its main brief, Rule 41 of the Federal Rules of Criminal Procedure cannot supply the basis for such an order. There are many aspects of Rule 41 that show that it was not drafted to cover electronic surveillance, e.g., it deals with tangible property, requires an inventory, orders are to be executed only between specified hours of the day, etc.

The Government, and the Court below, recognize that the order at issue here cannot be brought specifically within the terms of Rule 41 but attempt to use that authority as some sort of collateral support by the use of such terms as "common sense approach" (Opinion of Tenney, J., p. 7) and "the fair implications of Rule 41" (Gov. brief, p. 10). The fact remains, however, as Appellant points out in its main brief (pp. 10-15), there is no statutory authority outside of Title III for the issuance of the order in question here. The District Court for the Western District of Missouri has held that without statutory authority a District Court is powerless to issue an order for a pen register except under the provisions of Title III In Re Application of the United States, 44 Law Week 2367 (January 19, 1976), and the Court of Appeals for the Ninth Circuit had earlier held that the federal courts have no authority, unless Congress grants it, to direct orders to supply facilities to telephone companies simply because, otherwise, the order sought by

the Government could not be effectively implemented. Application of the United States, 427 F.2d 639 (1970)

It is important that the Court understand what is at stake here. The brief of the Government commences with a section designed to lead the Court to the conclusion that a pen register is a relatively innocuous device, routinely used in the communications business, and that its potential for invasion of privacy is quite limited - in fact, that nothing is at stake here that could not be obtained from other records. That, with all due respect, substitutes form for reality.

Wholly aside from the fact recited above that whom one calls is itself an element of privacy entitled to protection, if the Order granted here is sustained, it and others like it will enable the Government to do an end run around the careful safeguards erected by Congress in Title III.

As was pointed out in the affidavit submitted on behalf of Appellant to the Court below by F. Natoli, once the lines are provided to the Government's premises for the installation of a pen register, the Government possesses full wiretap capability (Appendix, p. 13). In fact, modern versions of what is archaically referred to as a "pen register" can themselves be used for listening in. They are sophisticated electronic devices. This was clearly recognized by the Court of Appeals for the Fifth Circuit in

In Re Joyce, 506 F.2d 373 at 377, when it stated: ". . .once a pen register has been installed, a full wiretap 'interception' of telephone conversations may be accomplished simply by attaching headphones or a tape recorder to the appropriate terminal on the pen register unit." It stretches credulity to believe that Congress, in enacting Title III, the comprehensive statutory framework setting forth the limited circumstances under which wiretapping and electronic surveillance, with appropriate safeguards, can take place, intended to allow the Government to proceed as it would do here with the inherent capability for abuse.

The District Court for the Western District of Missouri has held this could not have been Congress' intent. In Re Application of the United States, supra.

But regardless of the validity of the Order insofar as it permits action by the Government itself, the Court below clearly exceeded its authority in directing Appellant to participate affirmatively with law enforcement in a criminal investigation outside of the scope of Title III.

In its brief, the Government takes the position that the District Court has inherent authority, and statutory authority under the All Writs Act (28 U.S.C. § 1651(a)), to compel Appellant, a private party, to actively assist in the Government's criminal investigation (Gov. brief, pp. 10-13). The Government further alleges that Congress

has explicitly recognized the need for such participation by Appellant and other communication common carriers. The Government does not meet Appellant's contention, as set forth in its main brief (pp. 3-9). that such an interpretation is directly contrary to the holding of the Court of Appeals for the Ninth Circuit in the case of Application of the United States, supra, as well as the plain language of the Congressional amendments to Title III authorizing such assistance and providing immunity therefor. The Ninth Circuit held that a District Court possesses no such authority, either inherent or under the All Writs Act, and the Order herein does not come within the scope of the authority subsequently granted by the Congress. It is true, as cited by the Government, that the Seventh Circuit in United States v. Illinois Bell Telephone Company No. 75-1909 (1976) held that a District Court does have such authority under the All Writs Act to compel a telephone company to actively participate with law enforcement in placing a pen register. However, we respectfully submit, as set forth in our main brief, that the Court was mistaken since the All Writs Act is not an independent source of jurisdiction (See Appellant's main brief, pp. 6-8 and the cases cited therein), and that the Court was further mistaken in relying on the Congressional enactment subsequent to the decision of the Ninth Circuit. The only other case cited by the Government, United States v. Moore, 427 F.2d 1020 (10th Cir. 1970), does not support

the Government's position. It is almost a classic case of a Court exercising its inherent power to protect the very subject matter of its jurisdiction pendenti lite. In Moore, the Court used the All Writs Act to maintain the status quo in the proceeding before it and not as the basis of authority to order a private third party to take affirmative action. The All Writs Act cannot provide the authority for the Court below to direct Appellant to actively participate with the Government in a criminal investigation.

The Congressional amendments to Title III authorizing assistance by Appellant and other communication common carriers are clearly limited in their applicability to Title III orders, a basis on which the Government has declined to proceed here. These amendments provide no basis or authority for the Court below to direct Appellant, a private party, to provide such assistance in connection with a non-Title III order. (See Appellant's main brief, pp. 6-8)

CONCLUSION

For the reasons set forth above and in Appellant's main brief, Appellant respectfully submits that the Court below exceeded its jurisdiction and its order should be set aside.

Respectfully submitted,

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AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

FRANK R. NATOLI, being duly sworn deposes and says:

That on this 20th day of April, 1976, a true copy of the foregoing reply brief of appellant NEW YORK TELEPHONE COMPANY was delivered to the office of WILLIAM I. ARONWALD, Attorney in charge of United States Department of Justice, Joint Strike Force Against Organized Crime, at 1 St. Andrews Plaza, New York, New York.

Sworn to befor me this
20 day of April, 1976.

Frank R Natoli
Frank R. Natoli

Walter Wolke

WALTER WOLKE
NOTARY PUBLIC, State of New York
No. 41-9728850
Qualified in Westchester County
Commission Expires March 30, 1978